No. 88-1503

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NANCY BETH CRUZAN, BY HER PARENTS AND CO-GUARDIANS, LESTER L. AND JOYCE CRUZAN,

Petitioners,

v.

DIRECTOR OF MISSOURI DEPARTMENT OF HEALTH, AND ADMINISTRATOR OF THE MISSOURI REHABILITATION CENTER AT MT. VERNON,

Respondents,

v.

THAD C. MCCANSE, GUARDIAN AD LITEM,

Respondent,

On Writ of Certiorari
to the Missouri Supreme Court

BRIEF OF PHARMACISTS FOR LIFE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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EDITOR'S NOTE:

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE ON BEHALF OF RESPONDENT

Amicus hereby respectfully moves for leave to file a brief amicus curiae in the present case. Requested consent of parties is expected but has not yet been received and filed. When filed, it will make this motion unnecessary.

INTEREST OF AMICUS CURIAE

Pharmacists for Life is a nationwide organization of pharmacists who use their experience and background in their free time to advocate increased respect for human life, especially the lives of the weakest and most vulnerable. They apologize to the great Justices who are criticized in the dissenting opinion of the Justices which forms the last 60% of this brief, but feel his arguments against an unenumerated Right to Privacy are relevant herein.

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SUMMARY OF ARGUMENT

Good cases make bad law. Hundreds of years ago, equity was invented to do justice in trial courts where a plain meaning of the law might bring about injustice. The court might actually break the written law in order to do justice in an unusual fact situation. This was considered a great advance by everyone except the losing parties who had the written law on their side.

The same general concept has been applied by US Supreme Court Justices far removed from the trial. It started with a finding, not really criticized, that the US Supreme Court had a duty to find certain laws unconstitutional. Like most good principles, it was extended. By a series of small steps, in each case relying, of course, on the previous cases and going one step farther. This Court

has reached a point so far from the original wording of the US Constitution that it has relied on an amendment which purports to protect the right to life to define a right to kill which appears to those in the Right to Life movement to be the opposite of the Right to Life. This concept works much better in trial courts than in appellate courts the opinions of which become general laws. One of the most learned criticisms of this extension of judicial power was the dissents of Justices Black and Stewart, infra, pages 21-54. Pages 1-20 comprise arguments from experience of certain members of Pharmacists for Life. Some PVS people recover, so it cannot be said that the upper brain functions of the PVS are dead. All that can be said is that we are unable to detect or enhance these upper brain functions with today's technology.

This indicates the scientific foundation (brain death) supporting some briefs in support of Petitioners (such as the AMA) is very loose sand, perhaps quicksand.

Pharmacists provide IV products to lay people caring for the PVS in their homes. The coupling of the tube means is a medical procedure, but the subsequent feeding is so simple, any average lay person can do it. If what follows is a medical procedure, so might be the taking of that pill when the doctor suggests aspirin, so might be the eating of what they would rather not eat by heart patients because white chicken meat is leaner than beef, so are a variety of things not presently considered to be medical care or treatment. We beg the Court to ask itself what the second, third and ultimate killing steps might be if the Court reverses.

Juanita suffered a stroke a few months ago. Her weight slipped to 65 pounds and a lot of people thought she would probably die soon. Her husband wanted her home, with him - he didn't believe she was ready to die. There was no speech and it didn't look like Juanita was even aware of where she was. She was not in a coma and she was not diagnosed as being in any sort of 'vegetative state'. Juanita is very weak and she depends on help from someone for every need. This lady cannot eat to this day and receives all of her nutritional needs through a tube in her stomach. Her husband cares for her, and as her weight changes climb, adjustments were made to her intake to match it to her needs.

Today Juanita is awake a lot and very alert. She doesn't talk, but she does respond to people and answers some questions with a nod or a smile. She is still a companion to her husband. When I visited them today, they were watching the Chicago Cubs together; they seemed happy. I'm happy too, happy that someone didn't think she was 'too far gone' a few months ago asking to have her tube feedings discontinued. I know that Juanita was in that very small, weak, body back then, and she may have heard the talk about the feedings. She may have understood that there were people who felt that withholding her food was the best thing for her, her husband, the rest of the family, and everyone else. She may have had time to think of their conversations as hunger set in, then dehydration, and then death by starvation.

Six days before Carrie Coons awoke from a coma, a New York court had

authorized her family to withdraw her feeding tube because of her "irreversible" and "hopeless" state. To say the least, her return to consciousness was suprising and illustrates a problem with our ability to define when a person's condition is so hopeless as to warrant the withdrawal of nutrition.

Life that we refer to as 'normal' stopped for Nancy Cruzan in January of 1983. She was in an automobile accident that has left her in a very 'abnormal' state. She's been in a coma for most of these ensuing years and there is a controversy today as to what should be done with her. There are those who feel she's in a persistent vegetative state (PVS). Others disagree and say she responds, has some eye movement and expresses some emotions.

Like Juanita Nancy cannot eat and she receives all of her nutritional needs through a tube. Nancy is also totally dependent on others. Like an infant, Nancy lives but needs constant assistance. Unlike the infant, it doesn't look like Nancy will ever again be able to attain the status of 'normal'.

Nancy's body is a burden to many people and it is being recommended that she be allowed to starve to death. There are people who have now asked the court for permission to stop the regular administration of her nutritional support. The reasons they cite for the action they're contemplating all sound very rational and logical. In almost every case the outcome of Nancy's death will be a condition that is better for everyone - the family, the state, the friends, the professional caregivers -

everyone except Nancy. Nancy will have to die to make everything 'ok' again for those around her. People might say that Nancy would be better off, or that she'd want it this way, or dozens of other platitudes. Unfortunately, nobody can really find out what Nancy wants and no one knows what she hears, thinks or feels.

I propose that Nancy is still with us. Her body doesn't look right and it causes us much discomfort. Nancy is probably uncomfortable too. I wonder if she's uncomfortable enough to want to be starved to death. Starvation is not a pain free death. The dehydration alone is painful, what with the parched lips and burning eyes.

Medical science is doing nothing 'medical' to maintain Nancy in the twisted condition her body is in. No

drugs and no machines keep her alive. Her life force, her soul is still with us. Like her body, Nancy's soul was a gift from God; a gift that only God can take away. It is not our position to judge Nancy, her body or her wants. And it is most surely not our position to assume God's role and cast a death sentence on this innocent woman. She is guilty of no crime that would justify her execution. Even if she had been found guilty of some awful crime, our society would perform her execution more swiftly and painlessly than starvation. Suffocation is more swift, electricity, gas, lethal injection, firing squads and hangings may be painful. They're quick. Moments after the procedure is begun, the animal is dead. Starvation takes longer.

There is a basis in science and even

in religion that allows discontinuation of heroic life saving or life sustaining measures when death is imminent. If someone is going to die within a very short time, it is not in the interest of society, or the person, to subject them to a procedure that will 'artificially' keep the blood pumping, the lungs inflating and the skin warm. It takes a giant leap in imagination to equate the administration of food and water with heroic medical measures. Many people leave this world without ever needing medical treatment, medicines or life support machines. However, they never relinquish their need for food and drink.

Abraham Harold Maslow (1908-1970), was an American psychologist who many people consider to be the founder of a movement called humanistic psychology, a revolt against behaviorism and psychoanalysis.

Maslow identified several levels of human needs, the more basic of which must be satisfied before the next levels can be fulfilled. The most basic needs are defined as the bodily drives, such as hunger and thirst. Succeeding levels of safety, love follow next on the road to the highest needs for the fulfillment of one's unique potential.

Regardless of a person's physical condition, the basic bodily drives of hunger and thirst do not cease until the end, when the body is given over to death. To deny a person these basic needs, thus bringing about death, is to deny that there is life at all in the person. Who of us can judge with certainty when a person's body no longer needs food and drink? I grant that there are those among us who are very good at making such judgments, but case after

case has shown that these decisions to discontinue nourishment were premature. People have awakened from coma and there have been reversals of the PVS. To some, Juanita and Carrie seemed to be so close to death that it may have been felt that there was no more we could do to help them in their survival.

I have been a pharmacist since 1971, working in a variety of settings. Today, my wife and I are fortunate to be operating a small retail prescription pharmacy in Illinois. Since 1986, we have been involved with providing intravenous products and nutritional products to people in their homes. We are very involved with all of our patients and their families. Our business has given us the opportunity to experience first hand the very real difference between medicines and

nutrition. I am a member of Pharmacists For Life, an organization opposed to the use of the gift of medicines for the destruction of life, whether young or old, healthy or ill, born or unborn.

The World Book Encyclopedia states that "Medicine seeks to save lives and relieve suffering." I don't believe that the 'save lives' portion is stated before 'relieve suffering' by accident. The primary focus in medicine is to SAVE LIVES. To emphasize the relief of suffering as the initial function of medicine is to invite discussion of whose suffering we are to relieve. Even before who, we must consider degrees of suffering and when the suffering is too much. The medical ethical considerations are staggering when we first consider the subjective nature of suffering before we focus on the objective nature of saving

lives. The paramount issue is saving lives! The medicines we have should be used to achieve the goal, first of saving lives and next to relieve suffering. We oppose the use of medicines to terminate life. And we oppose the withdrawal of basic human needs to affect the same end.

Providing food and drink is not a medical procedure, it is providing the basic needs to a living body. Needs that are no more urgent than the need for oxygen. I am not aware that anyone is considering denying oxygen to Nancy Cruzan, to suffocate her. Why, then, are we in a situation where we are contemplating denying her food and drink.

If society really believes that Nancy's death is the best thing for her and everyone else, if we can really believe in our perfect ability to assume the role of God in judging Nancy, we should find a

quicker, more compassionate way to execute her. If we choose to execute her by denying nutrition, wouldn't it be quicker, and more humane, to deny her the oxygen she also needs? A problem arises here, someone will have to commit the act of suffocation, while omitting her nutritional supplements can be shared, thus lessening the impact of the results, Nancy Cruzan's death, her murder. Whether the sin is one of commission or omission, the results testify to the wrong that happens.

Not long ago, it was unheard of to consider the act of providing nutrition to a person as some sort of medical action. Granted, people in the health care field have been instrumental in designing better methods of administering nutrition; a scientific mindset is helpful in evaluating the effectiveness

of the methods used. The nutritional products most commonly administered by tubes into the gut are designed to provide protein, calories, vitamins and minerals that best duplicate a well balanced diet. Early formulations were basically blenderized meals. These have evolved into products that can be manufactured in bulk, stored and used effectively and safely. They provide standarized nutritional support. For the most part, the liquid foods are available without a prescription and can be purchased from many types of stores, NOT just from pharmacies - they are not medicines. Even with the availability of these standard nutritional products, many people still maintain their life with blenderized regular diets.

What is required to maintain a person with enteral nutrition? Really a lot

less than most people imagine. If a person has not lost the ability to swallow, they can supplement their meals with cans of nutritional product. These formulas are so complete, that a person can stay very healthy and active if they eat nothing but the liquid product.

If the ability to swallow is lost, a tube is inserted into the gut. For temporary conditions, the tube is threaded through the nose into the stomach. If the loss of swallowing is of longer term duration, the tube is inserted directly into the gut through the wall of the abdomen or stomach. Once inserted, these tubes require very little maintenance, and are of little bother to the person.

Now that the person has an access route to the gut, any nutritional product can easily be given. The more liquid the

food, the easier to administer through the tube. Some people measure an amount of liquid food product and drip it in at regular intervals throughout the day, anywhere from 3 to 6 times. First, the patient or helper, prepares the tube by pushing a small amount of water into the tube, to assure that it is clear. Then the measured amount of food is dripped or pushed in over 15 minutes to an hour. After the feeding, the tube is again flushed with water, then clamped off until the next feeding time.

Some people are very sensitive to high calorie liquid diets. If infused into the gut too rapidly, they experience cramping and diarrhea. This problem is frequently solved by either diluting the liquid food or slowing the administration time. This requires that the food be dripped in from a bag suspended above the

person. Occasionally, a person needs the food administered at a more constant rate. In these situations, a simple pumping device is used to control the flow of the liquid food. In rare cases, the food is infused continuously throughout the day. More often, the feedings are given at regular intervals, much like a regular meal schedule. The amount of time necessary to prepare, use, and clean up after a tube feeding is no more than the time to prepare a meal, eat it, and clean up.

A can of liquid food usually provides 250 Calories in about [illegible] ounces. An average person could [illegible] 2000 Calories a day. At [illegible] or a dollar a can, the daily [illegible] the food product would be [illegible]. Maintenance products [illegible], syringes and the like, may run [illegible] a month.

This is not a high priced process.

At the other end of the spectrum is the use of the parenteral route to provide nutrition. This route is directly into the veins of the body. This is often necessary when the alimentary tract (the gut) does not function, or is missing. Some disease states are helped by 'resting' the gastrointestinal tract for a period of time. These persons benefit dramatically from the 'rest' given when they receive their nutrition by the parenteral route.

The nutritional products used in these cases is similar to the enteral products discussed above. They contain protein, calories, vitamins and minerals. Because they are administered into the venous system of the body they are produced and prepared in extremely clean conditions. The system is

supplied as amino acids in solution. The calories are sugar solutions. The vitamins and minerals are supplied as sterile solutions. These compounds are usually mixed by a pharmacist under very clean conditions. They are always administered using a pumping or controlling device and they require specific training to be used safely and effectively. People can, and are, trained routinely to administer this type of nutritional product safely in the home setting. Many users are accident victims or suffering from malfunctions of the gut. Frequently they are young and quite often are cured of their problem and can return to normal enteral nutrition. Some people who have lost their gastro intestinal tract never discontinue this type of intravenous feeding. They survive and thrive, inconvenienced

mostly, because they need to be hooked to a pumping device for a period each day.

This parenteral type of feeding is available only by a physician's prescription and it is quite expensive, costing $16,360 or more per month. From an overall cost position, while this type of nutritional support is very expensive, the number of cases is so small that parenteral nutrition costs are not usually considered to be critical. The most important form of nutritional support, the one criticized the most, is enteral nutrition via tubes into the gut.

Nancy Cruzan receives her nutritional support like Juanita does, through a tube. She is being provided with nothing more than food and water; not some exotic, prescription only, high-tech form of therapy just food and water. Our science has made the food we give people

into Nancy into a very efficient product. We have made it easier to provide nutrition to those who can't eat or feed themselves. Liquid nutrition, given by whatever method, is nothing but the basic necessity of life, not to be withdrawn from any living person.

[There follows the dissents of Justices Black and Stewart in Griswold v Connecticut, 381 US 479 507-531, 14 L Ed 2d 510, 529-542, 85 S Ct 1678 with citations omitted]

Mr. Justice Black, with whom Mr. Justice Stewart joins, dissenting.

I agree with my Brother Stewart's dissenting opinion. And like him I do not to any extent whatever base my view that this Connecticut law is constitutional on a belief that the law is wise or that its policy is a good one. In order that there may be no room at all to doubt why I vote as I do, I feel constrained to add that the law is every bit as offensive to me as it is to my Brethren of the majority and my Brothers Harlan, White and Goldberg who, reciting reasons why it is offensive to them, hold it unconstitutional. There is no single

one of the graphic and eloquent strictures and criticisms fired at the policy of this Connecticut law either by the Court's opinion or by those of my concurring Brethren to which I cannot subscribe--except their conclusion that the evil qualities they see in the law make it unconstitutional.

Had the doctor defendant here, or even the nondoctor defendant, been convicted for doing nothing more than expressing opinions to persons coming to the clinic that certain contraceptive devices, medicines or practices would do them good and would be desirable, or for telling people how devices could be used, I can think of no reasons at this time why their expressions of views would not be protected by the First and Fourteenth Amendments, which guarantee freedom of speech. But speech is one thing; conduct

and physical activities are quite another. The two defendants here were active participants in an organization which gave physical examinations to women, advised them what kind of contraceptive devices or medicines would most likely be satisfactory for them, and then supplied the devices themselves, all for a graduated scale of fees, based on the family income. Thus these defendants admittedly engaged with others in a planned course of conduct to help people violate the Connecticut law. Merely because some speech was sued in carrying on that conduct--just as in ordinary life some speech accompanies most kinds of conduct--we are not in my view justified in holding that the First Amendment forbids the State to punish their conduct. Strongly as I desire to protect all First Amendment freedoms, I am unable

to stretch the Amendment so as to afford protection to the conduct of these defendants in violating the Connecticut law. What would be the constitutional fate of the law if hereafter applied to punish nothing but speech is, as I have said, quite another matter.

The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. But there is not. There are, of course, guarantees in certain specific constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities. Such, for example, is the Fourth Amendment's guarantee against "unreasonable searches and seizures."

But I think it belittles that Amendment to talk about it as though it protects nothing but "privacy." To treat it that way is to give it a niggardly interpretation, not the kind of liberal reading I think any Bill of Rights provisions should be given. The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth. He simply wants his property left alone. And a person can be just as much, if not more, irritated, annoyed and injured by a non ceremonious public arrest by a policeman as he is by a seizure in the privacy of his office or home.

One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional

guarantee another word or words more or less flexible and more or less restricted in meaning. This fact is well illustrated by the use of the term "right of privacy" as a comprehensive substitute for the Fourth Amendment's guarantee against "unreasonable searches and seizures. "Privacy" is a broad, abstract and ambiguous concept which can easily be shrunken in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than searches and seizures. I have expressed the view many times that First Amendment freedoms, for example, have suffered from a failure of the courts to stick to the simple language of the First Amendment in construing it, instead of invoking multitudes of words substituted for those the Framers used. For these reasons I [illegible] where in this

case by talk about a constitutional "right of privacy" as an emanation from one or more constitutional provisions. I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provisions. For these reasons I cannot agree with the Court's judgment and the reasons it gives for holding this Connecticut law unconstitutional.

This brings me to the arguments made by my Brothers Harlan, White and Goldberg for invalidating the Connecticut law. Brothers Harlan and White would invalidate it by reliance on the Due Process Clause of the Fourteenth Amendment, but Brother Goldberg,while agreeing with Brother Harlan, relies also on the Ninth Amendment. I have no doubt that the Connecticut law could be applied in such a way as to abridge freedom of speech and press and therefore violate the First and Fourteenth Amendments. My disagreement with the Court's opinion holding that there is such a violation here is a narrow one, relating to the application of the First Amendment to the facts and circumstances of this particular case. But my disagreement with Brothers Harlan, White and Goldberg is more basic. I think that if properly construed neither the Due Process Clause nor the Ninth Amendment, nor both together, could under any circumstances be a proper basis for invalidating the Connecticut law. I discuss the due process and Ninth Amendment arguments together because on analysis they turn out to be the same thing--merely using different words to claim for this Court

and the federal judiciary power to invalidate any legislative act which the judges find irrational, unreasonable or offensive.

The due process argument which my Brothers Harlan and White adopt here is based, as their opinions indicate, on the premise that this Court is vested with power to invalidate all state laws that it considers to be arbitrary, capricious, unreasonable, or oppressive, or this Court's belief that a particular state law under scrutiny has no "rational or justifying" purpose, or is offensive to a "sense of fairness and justice." If these formulas based on "natural justice," or others which mean the same thing, are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or

unnecessary. The power to make such decisions is of course that of a legislative body. Surely it has to be admitted that no provision of the Constitution specifically gives such blanket power to courts to exercise such a supervisory veto over the wisdom and value of legislative policies and to hold unconstitutional those laws which they believe unwise or dangerous. I readily admit that no legislative body, state or national, should pass laws that can justly be given any of the invidious labels invoked as constitutional excuses to strike down state laws. But perhaps it is not too much to say that no legislative body ever does pass laws without believing that they will accomplish a sane, rational, wise and justifiable purpose. While I completely subscribe to the holding of Marbury v.

Madison, 1 Cranch 137, 2 L ed 60, and subsequent cases, that our Court has constitutional power to strike down statutes, state or federal, that violate commands of the Federal Constitution, I do not believe that we are granted power by the Due Process Clause or any other constitutional provision or provisions to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our own notions of "civilized standards of conduct." Such an appraisal of the wisdom of legislation is an attribute of the power to make laws, not of the power to interpret them. The use by federal courts of such a formula or doctrine or what not to veto federal or state laws simply takes away from Congress and States the power to make laws based on

their own judgment of fairness and wisdom and transfers that power to this Court for ultimate determination--a power which was specifically denied to federal courts by the convention that framed the Constitution.

Of the cases on which my Brothers White and Goldberg rely so heavily, undoubtedly the reasoning of two of them supports their result here--as would that of a number of others which they do not bother to name, e.g., Lochner v. New York, etc. The two they do cite and quote from were both decided in opinions by Mr. Justice McReynolds which elaborated the same natural law due process philosophy found in Lochner v. New York, supra, one of the cases on which he relied in Meyer, along with such other long-discredited decisions as. . .Meyer held unconstitutional, as an "arbitrary"

and unreasonable interference with the right of a teacher to carry on his occupation and of parents to hire him, a state law forbidding the teaching of modern foreign languages to young children in the schools. And in Pierce, relying principally on Meyer, Mr.Justice McReynolds said that a state law requiring that all children attend public schools interfered unconstitutionally with the property rights of private school corporations because it was an "arbitrary, unreasonable and unlawful interference" which threatened "destruction of their business and property." Without expressing an opinion as to whether either of those cases reached a correct result in light of our later decisions applying the First Amendment to the States through the Fourteenth, I merely point out that the

reasoning stated in Meyer and Pierce was the same natural law due process philosophy which many later opinions repudiated, and which I cannot accept. Brothers White and Goldberg also cite other cases, such as NAACP v Button, Shelton v Tucker and Schneider v State, which held that States in regulating conduct could not, consistently with the First Amendment as applied to them by the Fourteenth, pass unnecessarily broad laws which might indirectly infringe on First Amendment freedoms. See Brotherhood of Railroad Trainmen v. Virginia ex rel. Brothers White and Goldberg now apparently would start from this requirement that laws be narrowly drafted so as not to curtail free speech and assembly, and extend it limitlessly to require States to justify any law restricting "liberty" as my Brethren

define "liberty." This would mean at the very least, I suppose, that every state criminal statute--since it must inevitably curtail "liberty" to some extent--would be suspect, and would have to be justified to this Court.

My Brother Goldberg has adopted the recent discovery that the Ninth Amendment as well as the Due Process Clause can be used by this Court as authority to strike down all state legislation which this Court thinks violates "fundamental principles of liberty and justice," or is contrary to the "traditions and [collective] conscience of our people." He also states, without proof satisfactory to me, that in making decisions on this basis judges will not consider "their personal and private notions." One may ask how they can avoid considering them. Our Court certainly

has no machinery with which to take a Gallup Poll. And the scientific miracles of this age have not yet produced a gadget which the Court can use to determine what traditions are rooted in the "[collective] conscience of our people." Moreover, one would certainly have to look far beyond the language of the Ninth Amendment to find that the Framers vested in this Court any such awesome veto powers over lawmaking, either by the States or by the Congress. Nor does anything in the history of the Amendment offer any support for such a shocking doctrine. The whole history of the adoption of the Constitution and Bill of Rights points the other way, and the very material quoted by my Brother Goldberg shows that the Ninth Amendment was intended to protect against the idea that "by enumerating particular

exceptions to the grant of power" to the Federal Government, "those rights which were not singled out, were intended to be assigned into the hands of the General Government [the United States], and were consequently insecure." That Amendment was passed, not to broaden the powers of this Court or any other department of "the General Government," but, as every student of history knows, to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication. If any broad, unlimited power to hold laws unconstitutional because they offend what this Court conceives to be the "[collective] conscience of our people" is vested in this Court by the Ninth Amendment, the Fourteenth Amendment, or any other provision of the Constitution, it was not given by the Framers, but rather has been bestowed on the Court by the Court. This fact is perhaps responsible for the peculiar phenomenon that for a period of a century and a half no serious suggestion was ever made that the Ninth Amendment, enacted to protect state powers against federal invasion, could be used as a weapon of federal power to prevent state legislatures from passing laws they consider appropriate to govern local affairs. Use of any such broad, unbounded judicial authority would make of this Court's members a day-to-day constitutional convention.

I repeat so as not to be misunderstood that this Court does have power, which it should exercise, to hold laws unconstitutional where they are forbidden by the Federal Constitution. My point is that there is no provision of the

Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational. The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts and worse for the country.

Subjecting federal and state laws to such an unrestrained and unrestrainable judicial control as to the wisdom of legislative enactments would, I fear, jeopardize the separation of governmental

powers that the Framers set up and at the same time threaten to take away much of the power of States to govern themselves which the Constitution plainly intended them to have.

I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time and that this Court is charged with a duty to make those changes. For myself, I must with all deference reject that philosophy. The Constitution makers knew the need for change and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification. That method of change was

good for our Fathers, and being somewhat old-fashioned I must add it is good enough for me. And so, I cannot rely on the Due Process Clause or the Ninth Amendment or any mysterious and uncertain natural law concept as a reason for striking down this state law. The Due Process Clause with an "arbitrary and capricious" or "shocking to the conscience" formula was liberally used by this Court to strike down economic legislation in the early decades of this century, threatening, many people thought, the tranquility and stability of the Nation. See, e.g., Lochner v New York. That formula, based on subjective considerations of "natural justice," is no less dangerous when used to enforce this Court's views about personal rights than those about economic rights. I had thought that we had laid that formula, as

a means for striking down state legislation, to rest once and for all in cases like West Coast Hotel Co v Parrish; Olsen v. Nebraska ex rel. Western Reference & Bond Assn. and many other opinions. See also Lochner v New York. In Ferguson v Skrupa, this Court two years ago said in an opinion joined by all the Justices but one that:

"The doctrine that prevailed in Lochner, Coppage, Adkins, Burns, and the like cases--that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely--has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."

And only six weeks ago, without even

bothering to hear argument, this Court overruled Tyson & Brother v Banton which had held state laws regulating ticket brokers to be a denial of due process of law. [Gold v DiCarlo], I find April's holding hard to square with what my concurring Brethren urge today. They would reinstate the Lochner, Coppage, Adkins, Burns line of cases, cases from which this Court recoiled after the 1930's, and which had been I thought totally discredited until now. Apparently my Brethren have less quarrel with state economic regulations than former Justices of their persuasion had. But any limitation upon their using the natural law due process philosophy to strike down any state law, dealing with any activity whatever, will obviously be only self-imposed.

In 1798, when this Court was asked to

hold another Connecticut law unconstitutional, Justice Iredell said: "[I]t has been the policy of all the American states, which have, individually, framed their state constitutions since the revolution, and of the people of the United States, when they framed the Federal Constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably void; through, I admit, that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case. If, on the other hand, the Legislature of the Union, or the

Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice." Calder v Bull (emphasis in original).

I would adhere to that constitutional philosophy in passing on this Connecticut law today. I am not persuaded to deviate from the view which I stated in 1947 in

Adamson v California (dissenting opinion):

"Since Marbury v Madison was decided, the practice has been firmly established,for better or worse, that courts can strike down legislative enactments which violate the Constitution. This process, of course, involves interpretation, and since words can have many meanings, interpretation obviously may result in contraction or extension of the original purpose of a constitutional provision, thereby affecting policy. But to pass upon the constitutionality of statutes by looking to the particular standards enumerated in the Bill of Rights and other parts of the Constitution is one thing; to invalidate statutes because of application of 'natural law' deemed to be above and undefined by the Constitution is another. 'In the [illegible] instance, courts

proceeding within clearly marked constitutional boundaries seek to execute policies written into the Constitution; in the other, they road at will in the limitless area of their own beliefs as to reasonableness and actually select policies, a responsibility which the Constitution entrusts to the legislative representatives of the people.' Federal Power Commission v Pipeline Co.

(Footnotes omitted.)

The late Judge Learned Hand, after emphasizing his view that judges should not use the due process formula suggested in the concurring opinions today or any other formula like it to invalidate legislation offensive to their "personal preferences," made the statement, with which I fully agree, that:

"For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not."

So far as I am concerned, Connecticut's law as applied here is not forbidden by any provision of the Federal Constitution as that Constitution was written, and I would therefore affirm."

Mr. Justice Stewart, whom Mr. Justice Black joins, dissenting.

"Since 1879 Connecticut has had on its books a law which forbids the use of contraceptives by anyone. I think this is an uncommonly silly law. As a practical matter, the law is obviously unenforceable, except in the oblique context of the present case. As a philosophical matter, I believe the use of contraceptives in the relationship of marriage should be left to personal and private choice, based upon each individual's moral, ethical, and

religious beliefs. As a matter of social policy, I think professional counsel about methods of birth control should be available to all, so that each individual's choice can be meaningfully made. But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do.

In the course of its opinion the Court refers to no less than six Amendments to the Constitution: the First, the Third, the Fourth, the Fifth, the Ninth, and the Fourteenth. But the Court does not say which of these Amendments, if any, it thinks is infringed by this Connecticut law.

We are told that the Due Process Clause of the Fourteenth Amendment is not, as such, the "guide" in this case.

With that much I agree. There is no claim that this law, duly enacted by the Connecticut Legislature, is unconstitutionally vague. There is no claim that the appellants were denied any of the elements of procedural due process at their trial, so as to make their convictions constitutionally invalid. And, as the Court says, the day has long passed since the Due Process Clause was regarded as a proper instrument for determining "the wisdom, need, and propriety" of state laws. Compare Lochner v New York with Ferguson v Skrupa. My Brothers Harlan and White to the contrary, "[w]e have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." Ferguson v Skrupa, supra.

As to the First, Third, Fourth, and Fifth Amendments, I can find nothing in any of them to invalidate this Connecticut law, even assuming that all those Amendments are fully applicable against the States. It has not even been argued that this is a law "respecting an establishment of religion, or prohibiting the free exercise thereof." And surely, unless the solemn process of constitutional adjudication is to descend to the level of a play on words, there is not involved here any abridgment of "the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." No soldier has been quartered in any house. There has been no search, and no seizure. Nobody has been compelled to be a witness against himself.

The Court also quotes the Ninth Amendment, and my Brother Goldberg's concurring opinion relies heavily upon it. But to say that the Ninth Amendment has anything to do with this case is to turn somersaults with history. The Ninth Amendment, like its companion the Tenth, which this Court held "states but a truism that all is retained which has not been surrendered," United States v Darby, was framed by James Madison and Adopted by the States simply to make clear that the adoption of the Bill of Rights did not alter the plan that the Federal Government was to be a government of express and limited powers, and that all rights and powers not delegated to it were retained by the people and the individual States. Until today no member of this Court has ever suggested that the Ninth Amendment meant anything else, and

the idea that a federal court could ever use the Ninth Amendment to annul a law passed by the elected representatives of the people of the State of Connecticut would have caused James Madison no little wonder.

What provision of the Constitution, then, does make this state law invalid? The Court says it is the right of privacy "created by several fundamental constitutional guarantees." With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court.

At the oral argument in this case we were told that the Connecticut law does not "conform to current community standards." But it is not the function of this Court to decide cases on the basis

of community standards. We are here to decide cases "agreeably to the Constitution and laws of the United States." It is the essence of judicial duty to subordinate our own personal views, our own ideas of what legislation is wise and what is not. If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true Ninth and Tenth Amendment rights to persuade their elected representatives to repeal it. That is the constitutional way to take this law off the books.

CONCLUSION

The Court should not reverse.

Respectfully submitted,

ROBERT L SASSONE
Attorney for amicus

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REHABILITATION CENTER AT MT. VERNON,
Respond

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THAD C. McCANSE, GUARDIAN AD LITEM,
Respon

Affidavit of mailing of amicus brief
copies, Rule 28.2

State of California
City of Santa Ana, County of Orange

Robert L Sassone, being first duly s
on his oath deposes and says:
Robert L Sassone is a member of
bar of the United States Supreme Cou
admitted October 26, 1971. To his
knowledge, on October 11, 1989, wi
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to Rule 28.2, he deposited in the Un
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pursuant to Rule 28.2 with first cla
postage prepaid 40 copies of the att
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addressed to the Clerk of the United
States Supreme Court and three copie
said amicus brief to each party addr
as follows:

BEST AVAILABLE COPY

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amicus brief in the present case properly
addressed to the Clerk of the United
States Supreme Court and three copies of
said amicus brief to each party addressed
as follows:

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_____

ROBERT L SASSONE, Affiant,

Subscribed and sworn to before me on October 11, 1989,

_____

Lawrence D Sassone, Notary Public